Table of Contents.

Table of Authorities Cited.

Cases.

Statutes.

MISCELLANEOUS.

Supreme Court of the United States.

OCTOBER TERM, 1972.

No. 71-1304.

CHARLES B. BRADLEY, JR., BYRON H. JOHNSON, ROBERT T. ODELL, JR., AND WILLIAM JAMES HELLIESEN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF RALPH DE SIMONE, AMICUS CURIAE.

Interest of Amicus.

This brief is filed with the consent of the parties. Letters of consent are on file with the Clerk in their original manuscript form, and they are reprinted herein as Appendix D. It is submitted because, as will appear, the *amicus* has a direct and substantial interest in the outcome of this litigation. Despite his interest, however, the *amicus* has no desire to burden this Court with a brief which simply repeats matters fully discussed by the parties. The *amicus* has had

the benefit of a preliminary draft of the brief submitted by the Petitioners, and accordingly the *amicus* will be able to make his additional points with some economy.

The opinion below, jurisdiction of this Court, questions presented, statutory provisions involved, and statements of the case are adequately presented by the parties to this litigation; accordingly they are omitted here. So far as pertains to this *amicus*, however, we will set forth pertinent facts, and we have included several appendices setting forth portions of the record of the *amicus'* case currently pending on appeal in the United States Court of Appeals for the Second Circuit.

The *amicus* was a defendant in *United States of America* v. *Ralph De Simone and Anthony Pagliuca*, Indictment No. 71 Cr. 587 (U.S. D.C., S.D. N.Y.) (Appendix A). The indictment, filed on June 2, 1971, charged De Simone with a single count conspiracy to violate the narcotic importation statute, Title 21, United States Code, Sections 173 and 174 (repealed effective May 1, 1971) from "on or about the 1st day of December, 1967 and continuously thereafter up to and including the date of the filing of this indictment [June 2, 1971] . . . ." Four overt acts are listed in the indictment, beginning with an act on or about May 1, 1970, and concluding with an act on or about May 17, 1971.

While this conspiracy was going forward, the statute upon which the indictment is predicated was repealed by Pub. L. 91-513, which was enacted to cover the conduct previously made criminal by 21 U.S.C. §§ 173 and 174. The new statute, known as the Comprehensive Drug Abuse Prevention and Control Act of 1970, became effective on May 1, 1971, the same date that the repeal of the old statute became effective. The major difference between the new and old statutes is that the new statute made more flexible the

penalty and related provisions for narcotic violations. Of particular interest to the *amicus* is the repeal of 26 U.S.C. § 7237(d)(1), which statute had deprived convicts in narcotics cases of parole eligibility under 62 Stat. 854, 18 U.S.C. § 4202.

Mr. De Simone was sentenced on March 6, 1972, to a term of ten years and a fine of $20,000 under 21 U.S.C. §§ 173 and 174. Under the current Second Circuit doctrine, see, *e.g.*, *United States* v. *Fiotto*, 454 F. 2d 252 (1972), his sentence will be subject to the no-parole provisions of repealed § 7237(d). Mr. De Simone took an appeal from denial of his motion to correct sentence, which appeal is now pending in the United States Court of Appeals for the Second Circuit (Docket No. 72-1311), with oral argument currenly scheduled for the second week of September 1972.

The *amicus* has, of course, a direct interest in the Petitioners' securing a victory on any one or more of the points advanced by them, for a more flexible sentencing approach would, at the very least, make the Petitioner a candidate for parole at the appropriate time.[1]

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[1] Normally, a federal prisoner is eligible for parole either after service of one-third of his sentence, 18 U.S.C. § 4202, 62 Stat. 854, as amended, or, if the sentencing judge so provides, immediately at the discretion of the parole board, 18 U.S.C. § 4208(a)(2). Hence, this issue of parole eligibility is ripe for the *amicus*, since a ruling that he is entitled to parole might make him immediately eligible should the sentencing judge impose a § 4208(a)(2) sentence. Because of the length of his sentence, the *amicus* is more concerned with the no-parole proviso of prior law than with the minimum-mandatory, no-probation, no-suspended sentence provisions. Hence, the *amicus* wishes to argue that even if the savings clause preserves the minimum-mandatory, no-probation, no-suspended sentence provisions, the no-parole provision still expired on the date of repeal and is not affected by the savings clause. Of

Finally, in the event that this Court ultimately rules against the contentions of the Petitioners, the *amicus* has an interest in persuading the Court that its opinion and holding should not be sufficiently broad to encompass the differing fact situation of his own case, thus depriving him of his "day in Court."

Summary of Argument.

Under the relevant savings statute, § 1103(a) of P.L. 91-513, the issue of whether a provision lives on after repeal depends solely upon whether its abandonment would "affect" or "abate" a "prosecution." Parole decisions, which are made by a nonjudicial body long after the end of trial, do not "affect" any "prosecution." Therefore, the proviso in § 7237(d) of former Title 21 making the parole statute inapplicable to narcotics offenses is not "saved" by § 1103(a). In this respect the no-parole proviso of § 7237 (d) may be distinguishable from the no-probation proviso. Arguably, the no-probation proviso "affects" a "prosecution" because the trial judge makes the decision whether to grant probation when he delivers his judgment at the end of the trial. By contrast, the decision whether to grant parole is made by an administrative body years later.

Even if § 1103(a) had never been enacted, and the more far-reaching provisions of 1 U.S.C. § 109 governed this case, the no-parole proviso would not survive its repeal, because § 109 applies only to substantive rights and penalties, and not to procedures and remedies. The no-parole proviso is basically forum-defining, and therefore procedural and

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course, the *amicus* would also benefit from a ruling eliminating the mandatory-minimum sentence proviso, since upon a re-sentencing the judge might decide to give him a more "creative" sentence involving perhaps a combination of time to be served and time suspended with probation.

remedial rather than substantive. Parole statutes do not necessarily reduce or increase penalties; they merely designate the tribunal which makes the final decision about the length of a defendant's imprisonment. To the extent that § 7237(d) did have the effect of increasing penalties, that effect can be "saved" without saving the procedural aspects of the no-parole proviso.

Even if in an indictment charging a substantive offense occurring prior to May 1, 1971, the saving provisos save the statute and penalty provisions and provisions relating to parole eligibility, nevertheless in an indictment for conspiracy where the repeal occurred in mid-conspiracy, the penalty provisions of the new statute should apply. A conspiracy is a continuing offense, and the point of "occurrence" of the conspiracy for purposes of legal analysis is the end, rather than the beginning of the conspiracy. Hence, the statute and penalty in effect at the end of the conspiracy should govern such cases.

Argument.

I. The Proviso in U.S.C. § 7237(d) Prohibiting Consideration for Parole does Not Apply to Persons Sentenced After its Repeal.

A. *The No-Parole Proviso in § 7237(d) has Not been Kept Alive by the Savings Clause of P.L. 91-513 because Consideration for Parole does Not Affect or Abate a "Prosecution."*

P.L. 91-513, which repealed the no-parole proviso in former § 7237(d) of Title 21, contains a savings clause, § 1103(a), which provides that

> "Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be

affected by the repeals or amendments made by such section . . . or abated by reason thereof."

Under this language, the question of whether a provision repealed by P.L. 91-513 is "saved" by § 1103(a) depends solely upon whether its abandonment would "affect" or "abate" a "prosecution."[2]

To hold that consideration for parole affects or abates a "prosecution" requires stretching of the meaning of "prosecution" beyond the bounds of common sense. As this Court stated in *Morrissey* v. *Brewer*, U.S. , 40 U.S.L.W. 5016, 5018, "Parole arises after the end of the criminal prosecution, including imposition of sentence. . . ." Parole decisions are made by a nonjudicial body months or years after prosecution ends.

Two maxims of statutory construction aid the conclusion that parole consideration does not affect "prosecution." First, as a savings clause, § 1103 is in derogation of common law and hence must be construed narrowly. See *United States* v. *Auerbach*, 68 F. Supp. 776 (S.D. Cal. 1946) (commenting on the general federal savings statute).[3] More

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[2] The general savings clause, 1 U.S.C. § 109, is superseded by the subsequently enacted specific language of § 1103(a). Otherwise, § 1103(a) would be completely superfluous; if it did not serve to limit § 109, it would have no other conceivable function. See generally brief of petitioners at 9-13. However, even if § 1103 had never been enacted, § 109 would not save the no-parole proviso of § 7237(d) because the no-parole proviso is procedural, not substantive. See pp. 15-20, *infra*.

[3] At common law, the repeal of a statute nullified it completely. No liability incurred under the statute could be enforced, and even pending prosecutions were abated. See *United States* v. *Stephens*, 449 F. 2d 103, 105, n. 6 (9th Cir. 1971). See generally Ruud, The Savings Clause—Some Problems in Construction and Drafting, 33 Tex. L. Rev. 284, 290, n. 23 (1955); Million, Expiration or Repeal of a Federal or Oregon Statute or Regulation as a Bar to Prosecution for Violations Thereunder, 24 Ore. L. Rev. 25 (1944).

fundamentally, the clause relates to a criminal statute, and hence any doubt must be resolved in favor of lenity:

> "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment." *Bell* v. *United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 622 (1955).
>
> "[W]hen reasonable doubt exists as to whether provisions of a statute that are penal in effect have been repealed, such doubt should be resolved against the government." *United States* v. *One Airplane*, 23 F. 2d 500 (S.D. Cal. 1927).

One of the central goals of P.L. 91-513 was to permit greater flexibility in the punishment and treatment of drug offenders. The minimum-mandatory, no-probation and no-parole provisions of the acts repealed by P.L. 91-513 were highly controversial. The no-parole provision constituted a particularly severe departure from rehabilitative ideals. The House Report on P.L. 91-513 shows that Congress knew that the repealed law conflicted with modern ideas of penology:

> "The modern concept of criminology should apply — that penalties fit offenders as well as offenses. Penalties should be designed to permit the offender's rehabilitation whenever possible. Although society must often be protected from the offender for a time, penalties in specific cases should recognize the need for reformation." U.S. Code Cong. & Adm. News (91st Cong., 2d Sess., 1970) 4575 (quote from Prettyman Commission Report by Committee).

After noting that the mandatory penalty provisions had been abolished in the new bill (with one narrow exception)[4] the House Report stated that:

> "The foregoing sentencing procedures give maximum flexibility to judges, permitting them to tailor the period of imprisonment, as well as the fine, to the circumstances involved in the individual case.
>
> "The severity of existing penalties, involving in many instances minimum mandatory sentences, have led in many instances to reluctance on the part of prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. In addition, severe penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences." U.S. Code Cong. & Adm. News, *id.*, at 4576. *See id.*, at 4636 (Senate Report).

The important policy change in punishment was also pointed out in debate. Congressman Bush of Texas said that

> "The bill eliminates mandatory minimum penalties, except for professional criminals. Contrary to what one might imagine, however, this will result in better

[4] See 21 U.S.C. § 848, which provides a minimum mandatory penalty for persons proven to have derived substantial income from managerial positions in illegal drug rings.

justice and more appropriate sentences. For one thing, Federal judges are almost unanimously opposed to mandatory minimums, because they remove a great deal of the court's discretion. . . .

"The penalties in this bill are not only consistent with each other, but with the rest of the Federal criminal law—something which cannot be said for present drug laws. As a result, we will undoubtedly have more equitable action by the courts, with actually more convictions where they are called for, and fewer disproportionate sentences." 116 Cong. Rec. 33314 (1970) (remarks of Representative Bush). See also *id.*, at 1182 (remarks of Senator Thurmond) and *id.*, at 35051 (remarks of Senator Dodd).

A harsh construction of the savings clause in P.L. 91-513 would conflict with the bill's fundamental goal of permitting the punishment to be tailored to fit the individual. It would continue, for many years, to perpetuate an anomalous and unjust proviso which, in narcotics cases, deprived the parole board of powers it retained in cases involving far more heinous crimes. See, *e.g.*, 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. § 1751 (presidential assassination); 18 U.S.C. § 2381 (treason). Moreover, persons who committed the same illegal acts and were tried at the same time would be treated very differently depending upon whether their crimes occurred before or after the date of repeal. Congress has indicated that a major purpose of the new drug law is to eliminate, with one narrow exception, a harsh provision which is found in no other federal criminal statute. This purpose should not be frustrated.

Some lower courts have held that the no-parole and no-probation provisos of § 7237(d) "affect" the "prosecution" within the meaning of § 1103, and hence survive the repeal of § 7237(d). See, *e.g.*, *United States* v. *Bradley*, 455

F. 2d 1181, 1191 (1st Cir. 1972); *United States* v. *Caldwell*, No. 72-1200 (3d Cir., July 5, 1972); *United States* v. *Ross*, No. 72-1135 (2d Cir., June 13, 1972); *United States* v. *Robinson*, 336 F. Supp. 1386, 1387 (W.D. Wis. 1972). *Contra*, *United States* v. *Stephens*, 449 F. 2d 103, 105 (9th Cir. 1971); *United States* v. *McGarr*, No. 72-1108 (7th Cir., April 28, 1972). These decisions rely upon the notion that "sentencing" is a part of "prosecution" since a criminal trial is not final for purposes of appeal until after sentence has been imposed. See *Berman* v. *United States*, 302 U.S. 211, 58 S. Ct. 164 (1937); *Korematsu* v. *United States*, 319 U.S. 432, 63 S. Ct. 1124 (1943). The attempt to define "prosecution" in terms of the rules about when an appeal may be taken is a sterile exercise in word-juggling. The question of whether imposition of sentence makes a trial final for purposes of permitting appeal has nothing whatever to do with the issue of whether certain incidents of a criminal penalty are included within the concept of "prosecution" under a savings clause. It is wrong to take out of context statements that sentencing marks the final judgment[5] and to attempt to mold them into a definition of "prosecution" for savings clause purposes. This is not the Heaven of Juristic Concepts in which each term has exactly the same meaning in every context. Even if the word "prosecution" were commonly used (which it is not[6])

[5] *E.g.*, the passage in *United States* v. *Robinson*, 336 F. Supp. 1386, 1387 (W.D. Wis. 1972), quoting *Berman* v. *United States*, 302 U.S. 211, 58 S. Ct. 164 (1937).

[6] The availability-of-appeal decisions, which are concerned with concepts of "finality" and "judgment" do not actually use the word "prosecution" very much. For example, the much-quoted case of *Berman* v. *United States*, 302 U.S. 211 (1937) ("[t]he sentence is the judgment"), never uses the word "prosecution." The ultimate misuse of availability-of-appeal rules occurs in *United States* v. *Ross*, *supra*, slip opinion at 3479, which states that "[F]or purposes of appeal, a prosecution is not complete until

in cases and statutes dealing with the availability of appeal, that word could well have a different meaning when used in a savings clause, since it would serve an entirely different purpose. Cf. *Sampson* v. *Channell*, 110 F. 2d 754 (1st Cir. 1940), cert. den. 310 U.S. 650 ("substance" and "procedure" have different meanings depending upon purpose for which used).

The issue now before the Court is not when a criminal conviction becomes appealable, but what the word "prosecution" refers to in a savings clause. Statutes use "familiar legal expressions in their familiar legal sense." *Henry* v. *United States*, 251 U.S. 393, 395 (1920) (Holmes, J.). In its usual sense, "prosecution" refers to a proceeding instituted "for the purpose of determining the guilt or innocence of a person charged with crime." Black's Law Dictionary at 1385 (Revised 4th Edition, 1968). It is distinguished in general usage from concepts such as "investigation" (pre-prosecution) and "punishment" (post-prosecution).[7] Obviously, a statute providing that "prosecu-

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sentence is imposed. Fed. R. App. P. 4(b)." The cited rule says nothing about the nature of a "prosecution," but merely requires that a notice of appeal be filed within 10 days of a criminal judgment, and that a notice filed prior to judgment be treated as filed as of the day of judgment. The word "prosecution" is not used in the rule.

[7] A now-repealed section in the Revised Statutes of 1874 illustrates the dichotomy of "prosecution" and "punishment" in the popular legal usage by treating them as separate concepts to be saved separately:

> "Sec. 5598. All offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be *prosecuted and punished* in the same manner and with the same effect, as if said repeal had not been made." Quoted in *United States* v. *Obermeier*, 186 F. 2d 243, 251 (2d Cir. 1950), cert. denied, 340 U.S. 951. (Emphasis added.)

tions" not be "affected" preserves the definition of a repealed offense, insures that the same elements of proof are required, and maintains any evidentiary presumptions built into the prior statute.[8] Moreover, it can reasonably be argued that if no penalty were impossible, the "prosecution" would be "affected," since the absence of any penalty would remove much of the importance of a finding of guilt. See *United States* v. *McGarr, supra,* slip opinion at 4-5. However, to hold that every incidental variation upon punishment "affects" a "prosecution" goes too far. The concept of "affecting" a "prosecution" in P.L. 91-513, § 1103, must be given a meaning more limited than the concept of maintaining a prior "penalty" under U.S.C. § 109, or the latter statute would be merely superfluous, something Congress must be presumed not to have intended.[9] *Cf.* Kauper, *Federal Trade Commission* v. *Jantzen*: Blessing, Disaster, or Tempest in a Teapot? 64 Mich. L. Rev. 1523, 1527-1528 (1966).

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[8] *See* 21 U.S.C. § 174 (presumption of knowledge that drug was imported).

[9] It would be frivolous to argue that the passage of § 1103 was inadvertent and that no effect upon § 109 was intended. Section 1103(b), relating to civil actions, manifests an unmistakable intent to modify the effect of § 109 by providing that:

> "Civil seizures or forfeitures and injunctive proceedings commenced prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section or section 1102, or abated by reason thereof." 84 Stat. at 294.

This section saves the controversial forfeiture provisions of prior law only where proceedings have already begun, whereas § 109 would have preserved vested forfeiture liabilities regardless of whether suit had already begun.

If either statute was passed inadvertently, it was § 109, not § 1103. The legislative history of § 109 suggests that Congress did not realize that the drafted language could be interpreted to make sweeping changes in the common law. *See* MacKenzie, Hamm v. City of Rock Hill and the Federal Savings Statute, 54 Geo. L. J. 173 (1965).

Even if the savings clause in § 1103(a) could be construed to save the *no-probation* proviso of § 7237(d), the *no-parole* proviso should die with the repeal. The two provisos are distinguishable for savings clause purposes.[10] The determination whether to grant *probation* is made by the trial judge at sentencing. Arguably, that decision affects the "prosecution," if the "prosecution" can be viewed as extending from indictment through judgment. See, *e.g.*, *United States* v. *Bradley*, 455 F. 2d 1181, 1191 (1st Cir. 1972); *United States* v. *Caldwell*, No. 72-1200 (3d Cir., July 5, 1972), slip opinion at 5-6. *Contra*, *United States* v. *Stephens*, 449 F. 2d 103, 105 (9th Cir. 1971). In contrast, consideration for *parole* takes place months or years after judgment, and the decision is made by officers of the executive branch, not the trial judge.

Lower court cases holding that § 7237(d) is saved by § 1103 have failed to recognize the distinction between probation and parole. See *United States* v. *Bradley*, *supra*; *United States* v. *Ross*, *supra*; *United States* v. *Caldwell*, *supra*; *United States* v. *Robinson*, *supra*. This omission stands out most vividly in *United States* v. *Ross*, *supra*, which seems to base its conclusion that prosecution includes sentencing partly upon the fact that the sentence is written on the same piece of paper as the judgment.[11] Yet while the paper setting forth the judgment and sentence contains language committing the defendant to custody for a certain

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[10] Defendant Bradley argues forcefully that *neither* proviso survives the repeal of § 7237(d). See brief of Petitioner at 13-18. *Amicus* De Simone does not quarrel with this argument, but merely wishes to point out that the two provisos are not necessarily in the same boat.

[11] "An essential ingredient of any prosecution is sentencing. Indeed, the Federal Rules of Criminal Procedure provide that a judgment of conviction must set forth the defendant's sentence, in addition to the plea, the verdict and the adjudication." Slip opinion at 3479.

term of years, it commonly contains no notation about parole,[12] about any other variation on imprisonment, or about early release because of accrued good time.[13] Those matters are not decided by the judge as part of sentencing, but are left to the discretion of executive officers within the leeway given them by law. The procedure thus differs sharply from that used for suspending sentence and imposing probation.

Even if the judgment (including sentence) is viewed as part of the "prosecution," parole rules are not part of the judgment unless a "judgment" consists not only of the express directions of the trial judge, but also all of the incidents of punishment provided for by law at the time of its pronouncement. Under this concept, the "judgment" would include the rules for conditional release on parole, 18 U.S.C. § 4202 *et seq.*, for conditional release by reason of accrued good time, 18 U.S.C. §§ 4161, 4164, for funeral or sick leave, 18 U.S.C. § 4082(c)(1), and for work-release programs, 18 U.S.C. § 4082 (c)(2). A mere liberalization of the rules of the work-release program would "affect" the "prosecution" of a person previously sentenced under this view of the scope of judgment. Such a result would be intolerable. Like work-release or funeral leave, parole is simply another variation upon the "custody" to which a

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[12] There is a limited exception for sentences imposed under 18 U.S.C. § 4208(a)(2).

[13] For example, the judgment in *amicus* De Simone's case merely recited that he was adjudged guilty under 21 U.S.C. §§ 173 and 174, and that "the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS and FINED $20,000.00." See Appendix E. This form of sentence is required by 18 U.S.C. § 4082(a). Even if § 7237(d) were interpreted to bar eligibility for parole, De Simone will be eligible for early release if, as is usually the case, he accrues "good time" under 18 U.S.C. § 4161.

prisoner has been remanded under his sentence, and not part of the judgment. Cf. *Henratty* v. *Zerbst*, 9 F. Supp. 230, 231 (D. Kan. 1934), appeal dismissed, 77 F. 2d 1023 (10th Cir. 1935):

> "While time spent on parole is a lower grade of punishment, the prisoner is none the less in the legal custody of the warden and confined within specified bounds. As long as the parole conditions are not breached he is absent from the prison with the permission of the authorities. He is not a free man but rather a prisoner with many privileges which have been accorded him because he is deemed trustworthy. He is a 'trusty' with enlarged bounds."

B. *The Proviso in Section 7237(d) Taking Jurisdiction Away from the Parole Board is Procedural and Remedial, Not Substantive, and Hence is Not Preserved by Any Savings Clause.*

Even if P.L. 91-513, § 1103 and 1 U.S.C. § 109 could be construed together so as to extend beyond merely saving provisions which affect "prosecutions," the no-parole proviso of section 7237(d) would still die on the date of its repeal. The no-parole proviso is basically procedural and remedial, not substantive. It simply changes the tribunal which determines the date of a defendant's release, without altering substantive rights and liabilities. Cf. *United States* v. *Stephens*, *supra*, 449 F. 2d at 105, n. 8.

Normally, the sentence pronounced by a federal judge is a flexible one. For example, a 15-year sentence will actually entail between 5 and 15 years of imprisonment.[14] Juris-

[14] See 18 U.S.C. § 4202 (parole board has jurisdiction to consider prisoner for conditional release after one-third of sentence served). For simplicity, the statutory provisions for early release because of accumulated "good time" will be ignored in this brief except where otherwise stated. See 18 U.S.C. § 4161.

diction to set the date of conditional release, within the minimum-maximum limits, is delegated by statute to the parole board. Like the trial judge, the parole board makes a discretionary sentencing decision, considering roughly the same factors of rehabilitation, deterrence, and punishment considered by the judge,[15] but with the benefit of information about the subject's behavior in prison.

The availability of parole does not, of course, mean that every defendant spends less time in prison than he would if it were not available. Judges, knowing of parole, are likely to set higher maximum sentences. Uncooperative prisoners can actually spend more time in prison than they would if the trial court were the only sentence-determining tribunal.[16]

It is settled that a statute which affects remedies and procedures, and not substantive rights or penalties, is not covered by the savings clause of 1 U.S.C. § 109. See *Great Northern Ry. Co.* v. *United States*, 208 U.S. 452 (1908); *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910) ("remedies and procedure" contrasted with "penalties, forfeitures and liabilities"); *Hallowell* v. *Commons*, 239 U.S. 506 (1916); *De La Rama Steamship Co., Inc.*, v. *United States*, 344 U.S. 386 (1953). See generally *United States* v. *Obermeier*, 186 F. 2d 243, 250-257 (2d Cir. 1950), cert. den. 340 U.S. 951 (1951) (extensive discussion of Supreme Court cases by Frank, J.).

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[15] See 18 U.S.C. § 4203(a), containing statutory standards for release.

[16] Moreover, should parole be revoked, the prisoner may have to serve his entire original sentence without credit for parole time, 18 U.S.C. § 4205, and in addition he may forfeit his previously accumulated "good time." 18 U.S.C. § 4165. His total time in "custody"—under parole supervision and in prison—will then be longer than it would have been had he never been granted parole, and even his total time of actual imprisonment will be longer if he serves his maximum sentence and forfeits some of the good time because of the revocation.

In *Hallowell* v. *Commons,* 239 U.S. 506, 36 S. Ct. 202 (1916) (Holmes, J.) the plaintiff, an Omaha Indian, sued to establish his title to certain lands held in trust by the United States. The suit was commenced under a statute conferring jurisdicion on the federal district courts. During the pendency of the suit, Congress passed a statute returning exclusive jurisdiction to the Secretary of the Interior. The Secretary was given considerable discretion, and his decision was to be final and conclusive. The plaintiff, dissatisfied with this new forum, claimed that Rev. Stat. § 13 (now 1 U.S.C. § 109) saved his suit from dismissal. The Supreme Court disagreed, saying that the new statute did not take away any substantive right, but merely "change[d] the tribunal that is to hear the case." 239 U.S. at 508. The plaintiff had to pursue his remedy under the "quasi-paternal supervision of the general head of Indian affairs." *Id.* The *Hallowell* statute is similar to P.L. 91-513 since both Acts take an area of responsibility away from the federal courts and revest it to the discretion of executive officers. The mere fact that a party feels, even justifiably, that the executive body may be less favorable to him than a court does not make the nature of the change any less "procedural" or any more "substantive."

That the restoration of the Parole Board's jurisdiction over persons sentenced for narcotics violations after the effective date of the repeal of § 7237(d) might be viewed as benefiting defendants more than the government does not make the change "substantive" rather than "remedial." [17] No one would claim that a statute restoring a

[17] As pointed out on page 16, *supra,* trial judges may be expected to give higher sentences under a parole-eligible statute than under a no-parole statute. As for defendants already sentenced, the parole board can make allowances if it finds that a defendant received a lower sentence because the judge was under the impression that the no-parole statute applied. Restoration of parole consideration does not give any prisoner a guarantee of early release;

form of collateral attack upon judgments was "substantive" instead of "procedural" simply because only defendants would benefit from it. Nor is the reduction of a statute of limitations from five to three years substantive simply because it only benefits defendants, not the government:

> "Since 1 U.S.C.A. § 109 . . . saves merely substantive 'rights' and 'liabilities,' we think it does not save limitation statutes as to past offenses. For usually, a statute of limitations is considered no part of a 'right' or 'liability,' but as affecting the 'remedy' only." *United States* v. *Obermier, supra,* 186 F. 2d at 254.

The substance-procedure distinction is elusive at times, but it serves a useful function:

> "The abstract logic of the distinction between substantive rights and remedial or procedural rights may not be clear-cut, but it has been found a workable concept to point up the real and valid difference between rules in which stability is of prime importance and those in which flexibility is a more important value." *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314 (1945).

Clearly flexibility is the more important value in the instant case. No one's legitimate expectations will be upset by permitting persons sentenced under the old narcotics laws to receive parole consideration. When Congress passed the original parole statute in 1910 it was quite willing to place modern penal theory above the "stability" of sentences already imposed by providing that "[E]very

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it simply gives the executive branch more flexibility in rehabilitating prisoners and in balancing the cost of incarceration against its benefits.

prisoner *who has been or may hereafter be* convicted of any offense . . . and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided." Act of June 25, 1910, c. 387, § 1, 36 Stat. 819. (Emphasis added.) Congress made the same value judgment in 1966 when it directed the Parole Board to consider release of persons confined under no-parole marihuana sentences. P.L. 89-793, § 502, 80 Stat. 1449.

In only one limited situation can an argument be made that the no-parole provision is as much of a penalty-defining provision as it is a forum-designating provision. When taken together with some of the minimum mandatory provisions of the former narcotics laws, the no-parole provision had the effect of setting an absolute minimum time which a defendant would be required to serve in prison. For example, 21 U.S.C. § 174 provided a sentence of 5 to 20 years for first offenders. But for the no-parole provisions of section 7237(d), a prisoner sentenced to five years might have been released in one-third time. With section 7237(d) in effect, a prisoner sentenced to five years would absolutely have to serve the five years minus "good time" — an actual total of approximately three years, eight months. See 18 U.S.C. § 4161. However, even if the revesting of jurisdiction in the Parole Board to conditionally release narcotics violators could be considered a substantive rather than procedural or remedial change because of its influence upon minimum mandatory penalties, § 7237(d) should be saved by 1 U.S.C. § 109 only to the extent that it has such a "substantive" effect. The penalty-designating effect of the no-parole provision of § 7237(d) could easily be saved simply by restricting parole consideration to prisoners who have served at least the minimum mandatory sentence minus good time. All the other effects of the no-parole proviso are forum-defining and jurisdictional, and therefore cannot be saved by 1 U.S.C. § 109 or P.L. 91-513, § 1103.

II. Even if This Court Resolves the Issues Raised in the Bradley Case against the Petitioners, it should Not Do so by Use of Language so Broad as to Determine the Question in the De Simone Case without Allowing De Simone his Day in Court.

A. *The De Simone Case Involves a Conspiracy which Continued even After the Repeal of 21 U.S.C. § 174.*

While the *amicus* De Simone presents in his case some issues which are identical to those raised by the Petitioners in the *Bradley* case, and while De Simone strongly supports Bradley's arguments with respect to the nonapplicability of the mandatory minimum, non-parolable sentence provisions to both the Bradley petitioners and to the *amicus*, nevertheless the *amicus* wishes to point out to the Court that his case presents a fact pattern which is significantly different from that of the *Bradley* case. More importantly, the fact pattern in Mr. De Simone's case is such that his case need not necessarily be decided in the event that this Court decides to rule against the contentions of the *Bradley* petitioners, for although a pro-Bradley ruling would necessarily benefit Mr. De Simone, a ruling adverse to Bradley need not, and should not, decide the De Simone issue.

The difference between the two cases lies in the fact that De Simone is charged only with a conspiracy to violate Title 21, United States Code, Sections 173 and 174. Conspiracy is classically an on-going and continuing offense. *Hyde* v. *United States*, 225 U.S. 347, 369, 32 S. Ct. 793, 803 (1912). In the De Simone indictment (App. A), the defendant is charged with an offense which began on December 1, 1967, and which continued until June 2, 1971, the date of the indictment. Among the four overt acts charged, three occurred prior to the May 1, 1971 "cut-off" date, while the fourth and, indeed, crucial overt act occurred after May 1 and hence after the sentencing provisions of the Compre-

hensive Drug Abuse and Prevention Act took effect. The Defendant's plea of guilty to the indictment, just as a jury's general verdict of guilty, necessarily is a plea of guilty to each and every element of the indictment. *United States* v. *Spock*, 416 F. 2d 165, 181 (1st Cir. 1969); *United States* v. *Shackelford*, 180 F. Supp. 857 (S.D. N.Y. 1957). Hence, De Simone's crime was a continuing one, in the middle of which the statute changed, along with the penalty. This fact has several crucial implications which we shall examine, *infra*.

B. *In a Continuing Conspiracy Case, where the Statute and/or Penalty have been Altered in Mid-Conspiracy, the Penalty Obtaining at the Close of the Conspiracy Governs the Sentence to be Imposed.*

Many cases present examples of criminal conspiracy statutes or penalty provisions being altered while a conspiracy is proceeding. Frequently, courts have adhered to the doctrine which dictates that in such cases, the sentencing court should impose sentence under the standard obtaining in the latter part of the conspiracy. Perhaps coincidentally, or perhaps because of a general modern trend toward harsher criminal penalties, most of these cases present fact situations where the later statute or penalty is found to be harsher than the earlier one. In such cases the courts have seen fit to impose the harsher penalty, despite the general maxim that in criminal cases, any doubt should be resolved in favor of lenity. See *Bell* v. *United States*, 349 U.S. 81, 83-84, 75 S. Ct. 620, 622 (1955).

Thus, in *Huff* v. *United States*, 192 F. 2d 911 (5th Cir. 1951), the defendants were convicted for conspiracy to violate the Internal Revenue laws relating to distilled spirits. At the time the conspiracy commenced, the statute (being the general federal conspiracy statute, the precursor of the

current 18 U.S.C. § 371) provided a prison sentence of not more than two years. While the conspiracy was transpiring, the statute was amended and the penalty was increased to five years. The defendants, wanting to take advantage of the earlier, more lenient penalty provision, argued that since "the offense of conspiracy is complete upon the meeting of minds in an agreement for a violation of a federal statute," therefore "persons so conspiring are subject to prosecution upon the commission of the first overt act." They further argued that since the crime was complete while the old statute was in effect, they had to be sentenced under the old, rather than under the new statute. (At 914.) The Court of Appeals for the Fifth Circuit held that it was proper to sentence under the later, harsher provision, and that this did not constitute an *ex post facto* law. See also *People* v. *Walczak*, 315 Ill. 49, 145 N.E. 660, and *State* v. *Hayes*, 127 Conn. 543, 18 A. 2d 895.

In one of the most carefully and fully reasoned opinions on the subject, the Ninth Circuit held that an increased penalty enacted in mid-conspiracy *must* be applied. In *Leyvas* v. *United States*, 371 F. 2d 714 (9th Cir. 1967), the conspiracy was formed, and all of the overt acts occurred prior to the amendment of the statute, but the court relied on the fact that, no matter when the overt acts were committed, the body of the indictment charged a conspiracy which continued until after the new, harsher statute was in effect.[18] The Court remanded to the district court judge for imposition of the longer sentence.

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[18] The Court pointed out that in cases involving 21 U.S.C. § 174, the conspiracy need not be evidenced by an overt act. It is only the dates charged in the body of the indictment, and not the overt acts, which sets the limits for the beginning and the end of the conspiracy. This, of course, negates any effect flowing from the sentencing judge's apparent attempt in the De Simone case to confine the conspiracy to the pre-amendment period by declaring the fourth, post-amendment overt act to be "out of the scope of

Ironically, *Leyvas* was sentenced under a harsher statute because the penalty provision related to 21 U.S.C. § 174 was made *harsher* in mid-conspiracy. De Simone was sentenced under a harsher statute because the 21 U.S.C. § 174 sentencing provision was made *less harsh* in mid-conspiracy! It would appear, at the very least, that a spirit of fair-minded, even-handed administration of the criminal laws was absent in at least one of these two cases. The weight of the law indicates that it was absent in the De Simone situation. If the trial court in *Leyvas* did not have the power to choose between sentencing under the old or under the new statutes, then the trial court here should not have such a choice. The legislative intent cannot be so arbitrary as to allow for precisely contrary applications of the rules of statutory interpretation merely in order to attain a harsher result in each case.

C. *Generally, a Conspiracy is Considered to Take Place at the Latest, rather than at the Earliest, Date in Cases Where it is Necessary to Pinpoint the Conspiracy in Time.*

Various situations arise in legal contexts where it is necessary to pinpoint the time of "occurrence" of a continuing conspiracy. For example, the date for tolling the statute of limitations in a conspiracy is the latest date that the conspiracy existed. The statute runs from the termi-

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the indictment." (Appendix B.) Moreover, the *Leyvas* court held that in cases where the dates of the overt acts are determinative of the date of the offense in conspiracy cases, it is the last overt act which counts. *Id.*, at 717.

nation, rather than from the commencement, of the conspiracy. *United States* v. *Kissel*, 218 U.S. 601 (1910); Developments in the Law—Conspiracy, 72 Harv. Law Rev. 920, 961-962 (1959); *Hyde* v. *United States*, 225 U.S. 347, 32 S. Ct. 793 (1912). And where a conspiracy is initiated at a time when the object thereof is not criminal, but where a statute is passed in mid-conspiracy making the object criminal, and where the conspiracy continued beyond the effective date of the criminal statute, it is the latter part of the conspiracy which is taken into account for purposes of determining liability. *Christianson* v. *United States*, 226 F. 2d 646 (8th Cir. 1955).

Furthermore, the "occurrence" of the crime of conspiracy cannot be pinpointed at the earlier portion because of the peculiar problems attached to voluntary withdrawal from a continuing crime. It is established that a defendant may at any time voluntarily withdraw from a conspiracy by renouncing participation. In some cases, such withdrawal may even have the effect of relieving the man of criminal liability. *People* v. *Moren*, 166 Cal. App. 2d 410, 415, 333 P. 2d 243, 246 (4th Dist. C. T. App. 1958). See also Wechsler, Jones and Korn, The Treatment of Inchoate Crimes in the Model Penal Code, 61 Colum. L. Rev. 957, 1003-1006 (1961). But at the very least, withdrawal relieves a former participant from liability for acts committed after his renunciation of membership. *People* v. *Moren*, *Id.* See also 72 Harv. Law Rev., *supra*, at 957. In this sense, total, irrevocable liability for the conspiracy is not incurred until it is either broken up by the authorities or until it has accomplished its purpose and ended of its own accord.

This matter of the point at which irrevocable liability is incurred in a conspiracy is not without importance when analyzing the effect of a savings clause or statute in a situation such as that of Mr. De Simone. In *Hertz* v. *Woodman*, 218 U.S. 205, 30 S. Ct. 621 (1910), the Court dealt with a

question of the obligation to pay an estate tax where the taxing statute involved had been repealed after the death of the testator. The Court went deeply into the "liability incurred" feature of the general federal savings statute and concluded that since the event which sealed the tax liability occurred prior to repeal, the savings statute served to save the statute for purposes of federal collection of the tax after the repeal. The crucial fact was that "the law, then unrepealed and in full force, operated to fasten, at the moment this right of succession passed by death, a liability for the tax imposed . . . ." And, equally important, "the occurrence of no other . . . event was essential to the imposition of a liability for the statutory tax upon the interest thus acquired." 218 U.S. at 220, 30 Sup. Ct. at 625. See also *Deal* v. *Federal Housing Administration*, 260 F. 2d 793 (8th Cir. 1958).

Conclusion.

For the above-discussed reasons, this Honorable Court should reverse the opinion and judgment of the United States Court of Appeals for the First Circuit in No. 71-1304 (O.T. 1972), and declare that the mandatory minimum no-probation sentence provisions and the deprivation of parole eligibility do not apply to defendants indicted or convicted or sentenced on or after May 1, 1971. Even if the Court holds that the mandatory-minimum no-probation

sentence provisions should be applied to such defendants, the no-parole provision should not apply. If this Court should rule that both the sentence and no-parole provisions apply, it should avoid making such a ruling in the context of an on-going conspiracy in the midst of which the old statute was repealed and was replaced by the Comprehensive Drug Abuse and Prevention and Control Act of 1970.

Respectfully submitted,

HARVEY A. SILVERGLATE,

ROGER C. PARK,

65A Atlantic Avenue,

Boston, Massachusetts 02110,

Counsel for *amicus* Ralph De Simone.

Of Counsel:

ZALKIND & SILVERGLATE,

Boston, Massachusetts.

Appendix A

Indictment

United States District Court
Southern District of New York

UNITED STATES OF AMERICA,

v.

RALPH DE SIMONE, and
ANTHONY PAGLIUCA,
Defendants.

71 Cr. 587

The Grand Jury charges:

1. From on or about the 1st day of December, 1967 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Ralph De Simone and Anthony Pagliuca, the defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate sections 173 and 174 of Title 21, United States Code.

2. It was part of the said conspiracy that the said defendants would unlawfully, wilfully, knowingly and fraudulently import and bring into the United States large quantities of narcotic drugs the exact amount and nature thereof being to the Grand Jury unknown.

3. It was further a part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported

and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACTS

1. In furtherance of the said conspiracy and to effect the objects thereof, on or about the 1st day of May, 1970, Guillermo Castillo named herein as a co-conspirator but not as a co-defendant, came to Seattle, Washington.

2. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 4th day of May, 1970, in the Southern District of New York, Anthony Fiotto, named herein as a co-conspirator but not as a co-defendant, came to the George Washington Hotel, 23rd Street, New York, New York.

3. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 9th day of March, 1971, Ralph De Simone came to the Chuck Wagon Restaurant, Fort Lee, New Jersey.

4. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 17th day of May, 1971, in the Southern District of New York, the defendants Ralph De Simone and Anthony Pagliuca came to the vicinity of the Sheraton Motor Inn, West 42nd and 12th Avenue, New York, New York.

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Foreman

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

RALPH DE SIMONE, and
ANTHONY PAGLIUCA,
Defendants.

71 Cr. 587
72 Cr. 54

New York, New York
January 20, 1972
10:45 a.m.

Before

Hon. John M. Cannella, D.J.

Appearances

Whitney North Seymour, Jr., Esq.
United States Attorney, Southern District of New York

James LaRossa, Esq.
Attorney for Defendant DeSimone

Gerald Shargel, Esq.
Attorney for Defendant Pagliuca

(Plea—Defendant Ralph DeSimone only)

[2] Mr. LaRossa: If it pleases the Court, Defendant Ralph DeSimone has an application.

Mr. DeSimone wishes to withdraw his plea of not guilty previously entered, your Honor, and plead guilty to indictment 71 Criminal 587 at this time.

The Court: Would you come up here and sit down so that we can talk and the reporter can hear you. It will be easier for me to hear you and you to hear me.

Mr. LaRossa: May I stand over here, sir.

The Court: Yes, please.

. . . . . .

[9] The Court: The Court finds that this defendant is acting voluntarily, that he understands the nature of the charges against him, that he also understands the consequences of taking a plea in this case, and further, I find that the government is in a position to establish the charge herein, and therefore, I direct the Clerk of the Court to read the charge to the defendant.

Mr. LaRossa: Your Honor, he has read that a number of times, and I think we could waive the reading of it if your Honor chooses.

The Court: Tell you what I want to do. I want him [10] to hear again the first paragraph, which is the charge and then you can skip the means, which are the second paragraph, and then read at least one overt act. We shorten it.

You waive the entire reading?

A. I waive the entire reading, your Honor.

The Court: It is very short the part that I asked him to read, so suppose you listen carefully, because I want to make sure that you do know what you are pleading to.

The Clerk: You are Ralph DeSimone?

Defendant DeSimone: Yes.

The Clerk: That is your attorney sitting there?

Defendant DeSimone: Right.

The Clerk: "The Grand Jury charges that on or about the first day of December, 1967, and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York and elsewhere, Ralph DeSimone, the defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code."

The Court: Now then since you waived the reading Paragraph 2 concerns the means by which it was to be done. [11] Paragraph 3 concerns the means by which it was to be done, and then, let's see, which overt act applies to you.

Mr. LaRossa: Three or four.

The Court: No. 4 is out of the scope of the indictment.

Mr. LaRossa: Three, sir.

The Court: All right, No. 3. And then the Clerk of the Court is directed to proceed from 1 and go to 3.

The Clerk: Overt Acts. "In furtherance of said conspiracy and to further the objects thereof, on or about May 1970, Giullermo Castillo, named herein as co-conspirator but not as a co-defendant came to Seattle, Washington."

"No. 3. In furtherance of the said conspiracy and to further effect the objects thereof, on or about the 9th day of March, 1971, Ralph DeSimone came to the Chuck Wagon Restaurant, Fort Lee, New Jersey."

Do you understand the charges just read to you?

Defendant DeSimone: Yes, sir.

The Clerk: You have previously pleaded not guilty to this charge. Do you now wish to withdraw your plea of not guilty and enter a plea of guilty to this charge?

Defendant DeSimone: I do.

The Clerk: How do you now plead?

Defendant DeSimone: Guilty.

[11a] The Court: All right, you may step down.

(Plea of Defendant Pagliuca follows.)

(Adjournment to March 6, 1972 for sentence.)

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ANTHONY PAGLIUCA, 72 Cr. 54
Defendant.

The Grand Jury charges:

1. From on or about the 1st day of May, 1971 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, Anthony Pagliuca, the defendant, Ralph De Simone, named herein as a co-conspirator, but not as a co-defendant, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841 (b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances to wit the substances commonly known as heroin and cocaine, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

1. In furtherance of the said conspiracy and to effect the objects thereof, on or about the 17th day of May, 1971,

in the Southern District of New York, Anthony Pagliuca, the defendant, came to the vicinity of the Sheraton Motor Inn 42nd Street and 12th Avenue New York, New York at approximately 4:45 P.M.

2. In furtherance of the said conspiracy and to further effect the objects thereof on or about the 17th day of May, 1971, in the Southern District of New York, specifically in the vicinity of 46th Street and 12th Avenue, New York, Anthony Pagliuca took possession of a green briefcase.

3. In furtherance of said conspiracy and to effect the objects thereof on or about the 17th day of May 1971, in the Southern District of New York, Ralph De Simone, named herein as a co-conspirator but not as a co-defendant, came to the vicinity of the Sheraton Motor Inn, 42nd Street and 12th Avenue, New York, New York at approximately 4:45 P. M.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).), and Section 846.)

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Foreman

WHITNEY NORTH SEYMOUR, JR.

Appendix D.

[Seal]

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D.C. 20530

July 25, 1972

Harvey A. Silverglate, Esq.
Zalkind & Silvergate
65a Atlantic Avenue
Boston, Massachusetts 02110

Re: Bradley v. United States
No. 71-1304, October Term, 1972

Dear Mr. Silverglate,

In response to the request in your letter of July 21, I hereby consent to your filing a brief amicus curiae in the above-entitled case on behalf of your client, Mr. Ralph DeSimone.

Very truly yours,
ERWIN N. GRISWOLD
Solicitor General

LAW OFFICES
FEATHERSTON, HOMANS & KLUBOCK
45 SCHOOL STREET, BOSTON, MASSACHUSETTS 02108
(617) 227-7830

DANIEL P. FEATHERSTON, JR.
WILLIAM P. HOMANS, JR.
DANIEL KLUBOCK
KIRBY Y. GRIFFIN
THOMAS G. SHAPIRO
FRANCIS C. LYNCH, JR.

July 24, 1972

Harvey A. Silverglate, Esq.
Zalkind & Silverglate
65a Atlantic Avenue
Boston, Massachusetts 02110

Re: Bradley et al v. United States
United States Supreme Court No. 71-1304

Dear Mr. Silverglate:

I acknowledge your letter of July 21, 1972, asking whether I have any objection to your filing an *amicus curiae* brief on behalf of Ralph DeSimone, whose case is presently on appeal in the United States Court of Appeals for the Second Circuit.

I have no objection to your filing a brief *amicus curiae* in the above case.

Sincerely yours,
WILLIAM P. HOMANS, JR.

WPH:JB

EDWARD M. ALTMAN
ATTORNEY AT LAW

Tel. 864-6200
CENTRAL SQUARE BLDG.
678 MASSACHUSETTS AVE.
CAMBRIDGE, MASS. 02139

July 24, 1972

Attorney Harvey Silverglate
65A Atlantic Avenue
Boston, Massachusetts

Re: Bradley, Johnson, O'Dell and Helliesen
vs. United States of America

Dear Harvey:

My consent is hereby given for you to file a brief amicus curiae on behalf of your client, Ralph De Simone as an adjunct to the above entitled case.

Very truly yours,
EDWARD M. ALTMAN

EMA:ESK

864-6200 Office
484-5490 Residence

Stanley R. Lapon
Attorney at Law

Central Square Bldg.
678 Massachusetts Ave.
Cambridge, Mass. 02139

July 24, 1972

Attorney Harvey Silverglate
65A Atlantic Avenue
Boston, Massachusetts

Re: Bradley, Johnson, O'Dell and Helliesen
vs. United States of America

Dear Harvey:

My consent is hereby given for you to file a brief amicus curiae on behalf of your client, Ralph De Simone as an adjunct to the above entitled case.

Very truly yours,
Stanley R. Lapon

SRL:ESK

Appendix E.

JUDGEMENT AND COMMITMENT
UNITED STATES DISTRICT COURT
For The
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
v. No. 71 Cir. 587
RALPH DE SIMONE

On this 6th day of March, 1972, came the attorney for the government and the defendant appeared in person and James La Rossa, Esq.,

IT IS ADJUDGED that the defendant upon his plea of guilty and the Court being satisfied there is a factual basis for the plea, has been convicted of the offense of unlawfully, wilfully and knowingly combining, conspiring, confederating and agreeing to violate Sections 173 and 174 of Title 21, U.S. Code. It was part of said conspiracy that the defendant would unlawfully, wilfully, knowingly and fraudulently import and bring into the U.S. large quantities of narcotic drugs. (Title 21, U.S. Code, Sections 173 and 174.) as charged and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS and FINED $20,000.00. TOTAL FINE of $20,000.00 is to

be paid or the defendant is to stand committed until the fine is paid or the defendant is otherwise discharged according to law.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

JOHN M. CANNELLA
United States District Judge
